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No. 01-400

In the Supreme Court of the United States

RICKY BELL, WARDEN, PETITIONER

v.

GARY BRADFORD CONE

ON WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether respondent's claim that counsel rendered ineffective assistance at a capital sentencing hearing by failing to present mitigating evidence and a closing argument is analyzed under *Strickland* v. *Washington*, 466 U.S. 668 (1984), or is subject to a presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984).

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INTEREST OF THE UNITED STATES

This case presents the question whether defense counsel's failure at a capital sentencing hearing to present mitigating evidence and a closing argument constitutes deficient representation that is conclusively presumed to be prejudicial. The United States has a substantial interest in the resolution of the question presented because claims of ineffective assistance of counsel under the Sixth Amendment are frequently asserted on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision is also

likely to affect ineffective-assistance-of-counsel claims brought by federal prisoners under 28 U.S.C. 2255.

STATEMENT

1. On August 9, 1980, respondent embarked on a violent two-day crime spree when he robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of watches, rings, and other items. Pet. App. 40. After the owner of the store alerted authorities and provided a description of the robber, police spotted respondent, who led them on a high-speed chase through mid-town Memphis and into a residential neighborhood. *Id.* at 85. There he abandoned his vehicle, and shot pursuing police officer B.C. Allen and a citizen, John Douglas Clark. Respondent also attempted to shoot another citizen, Herschel Dalton, after Dalton refused to surrender his car. *Id.* at 40.

On the following morning, respondent appeared at the door of an apartment in the same neighborhood and drew a pistol on resident Lucille Tuech when she refused to allow him to enter. Later that day, respondent broke through the back door of the home of an elderly couple, Shipley and Cleopatra Todd. Mr. Todd was 93 years old; Mrs. Todd was 79. Respondent killed the Todds after they refused to cooperate with him. Their brutally beaten and mutilated bodies were discovered three days later. Pet. App. 40-41.

2. a. A Tennessee grand jury indicted respondent on two counts each of first degree murder and murder in the perpetration of a burglary against Mr. and Mrs. Todd; three counts of assault with intent to commit murder in the first degree against Dalton, Allen, and Clark; and one count of robbery with a deadly weapon of the jewelry store. In April 1982, respondent was tried before a jury in the Criminal Court of Shelby

County. Pet. App. 41-42. The defense admitted committing the charged acts but contended that respondent was insane or lacked the mental capacity for the offenses because of drug abuse and stress arising from respondent's prior military service in Vietnam. *Id.* at 86, 103. In support of that theory, defense counsel presented two medical experts who testified that respondent suffered from "amphetamine psychosis" and post-traumatic stress syndrome. Trial Tr. 1670-1677, 1722-1762. The jury found respondent guilty on all counts.

b. During the penalty phase, defense counsel gave an opening statement in which he told the jurors that they could consider as mitigating evidence the proof of respondent's mental condition that was presented during the guilt phase, and that the judge would so instruct them. Pet. App. 114.[1] Counsel reviewed for the jury the testimony of the defense's two medical experts that respondent suffered from "amphetamine psychosis" and post-traumatic stress syndrome. *Id.* at 90, 115. Defense counsel concluded his opening remarks by arguing that "[t]here is good reason for maintaining life if you look at the whole man in this particular case" and by arguing that the jury's "mercy" would "raise[] [the jurors] to the level of God." *Id.* at 116, 117. Defense counsel also elicited, on cross-examination of a prosecution witness, testimony that respondent had

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[1] Section 39-2-203(e) of the 1982 Tennessee Code Annotated provides that the judge shall instruct the jury to consider "any mitigating circumstances and any statutory aggravating circumstances * * * which may be raised by the evidence at either the guilt or sentencing hearing, or both." The jury in this case was so instructed. Trial Tr. 2219. The jury was also instructed that mitigating circumstances could include the defendant's mental condition at the time of the offenses. *Id.* at 2221.

received a Bronze Star for his military service in Vietnam and had been honorably discharged. Trial Tr. 2123-2124. Counsel also interposed several objections during the prosecution's direct examinations, *id.* at 2129, 2130, one of which thwarted the prosecution's attempt to show the jury photographs of the murder victims' bodies taken several days after death, *id.* at 2134-2143. After the junior prosecuting attorney made a brief closing statement, respondent's counsel waived final argument. *Id.* at 2144-2147. The jury unanimously found four aggravating factors and no countervailing mitigating circumstances for each of the murders and sentenced respondent to death. *Id.* at 2223-2226. The Tennessee Supreme Court affirmed his convictions and sentence, *State* v. *Cone*, 665 S.W.2d 87 (1984) (Pet. App. 84-100), and this Court denied certiorari, 467 U.S. 1210 (1984).[2]

3. a. On June 22, 1984, respondent filed his first state court petition for post-conviction relief contending, *inter alia*, that trial counsel had rendered constitutionally ineffective assistance during the death penalty phase of the trial by failing to present mitigating evidence and by waiving final argument. The court rejected those contentions after a hearing in which trial counsel testified. Post-Conviction Hearing Tr. 91-173. The court found that counsel had "put a great deal of thought and preparation in this case." Pet. App. 29. With respect to mitigating evidence, the court found that counsel had "interviewed numerous family

[2] The Tennessee Supreme Court expressed doubt that the record supported the jury's finding of the fourth aggravating factor that respondent knowingly created a great risk of death to two or more people other than the murder victims, but the court held that any error was harmless. Pet. App. 98-99.

members and relatives whose testimony was contradictory and generally not helpful," and that his strategy was "to get as much mitigation in during the guilt/innocence phase as he could." *Ibid.* The court also found that counsel did not present a final argument as part of counsel's strategy to prevent the senior prosecutor from making a "devastating" closing argument of the type for which he was well known. *Ibid.*

b. The Tennessee Court of Criminal Appeals affirmed. Pet. App. 101-111. The court rejected respondent's claim that counsel was ineffective in failing to present mitigating evidence during the penalty phase. *Id.* at 108-110. The court explained that two defense medical experts had testified during the guilt phase, and that trial counsel was aware that the judge would instruct the jury during the penalty phase to consider mitigating evidence presented during the earlier phase. *Id.* at 108. The court further explained that counsel reasonably declined to present respondent's relatives and associates as witnesses at sentencing and that "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." *Id.* at 109. The court also held that it was "a legitimate trial tactic" for counsel to waive closing argument to prevent the prosecution from making a "very devastating closing argument[ ]" that "could not be answered by defense counsel." *Id.* at 110. The court concluded that "trial counsel's work and diligence could not remove the overwhelming evidence against [respondent]" and that "the findings of guilt and the imposition of the death penalty were based upon the facts and the law—not [on] shortcomings of counsel." *Id.* at 111.

The Tennessee Supreme Court denied respondent's permission to appeal, and this Court denied certiorari. 488 U.S. 871 (1988).

4. After respondent's second state petition for collateral relief was rejected as procedurally barred, respondent filed a petition for federal habeas corpus relief under 28 U.S.C. 2254 in the United States District Court for the Western District of Tennessee. In denying the petition, the district court held that respondent had failed to show any prejudice from counsel's failure to offer mitigating evidence during the penalty phase. Pet. App. 77-80. The court observed that counsel's performance did not involve a "total abdication of representation," because "counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence." *Id.* at 80.

The district court also found that respondent had not refuted the state court's determination that counsel's decision to forego closing argument was "a tactical choice to foreclose rebuttal argument by the prosecution." Pet. App. 81. The district court reasoned that

> [a] review of the closing remarks by the first prosecutor confirm that they were relatively straightforward—simply a recitation of the existence of four aggravating circumstances. There was no dispute that three of these circumstances definitely existed, and [respondent] presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced during the guilt phase.

Ibid. (citation and footnote omitted).

5. The Sixth Circuit rejected respondent's attacks on his convictions but found merit in his challenge to his sentence. Pet. App. 1-38. The court of appeals concluded that counsel's performance at sentencing in failing to present mitigating evidence and to give a closing argument was deficient under the performance prong of *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Pet. App. 31-36. The court reasoned that counsel "presented no mitigating evidence at all," *id.* at 33, and that "a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument." *Id.* at 35. The court further stated that the jury "could only have inferred that [respondent's] counsel was, by his silence, acquiescing to the prosecutor's plea that [respondent] be sentenced to death." *Id.* at 36.

The court concluded that "a presumption of prejudice is raised by counsel's behavior; thus [respondent] need not show actual prejudice." Pet. App. 37. The court observed (Pet. App. 32) that this Court in *United States* v. *Cronic*, 466 U.S. 648, 659 (1984), stated that prejudice may be presumed where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." The court of appeals held that, "[e]ssentially, [respondent] did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that [respondent] be put to death was not subjected to 'meaningful adversarial testing.'" Pet. App. 37 (quoting *Cronic*, 466 U.S. at 656).

SUMMARY OF ARGUMENT

A. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court announced a two-part test to govern all ineffective assistance of counsel claims alleging

attorney error. First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that "the deficient performance prejudiced the defense." *Id.* at 687.

Only in narrowly defined contexts has this Court not required a showing of prejudice to establish a Sixth Amendment violation. This Court has applied a conclusive presumption of prejudice when the government has totally denied counsel to a defendant, or when the government has interfered with counsel's ability to function at a critical stage of a proceeding. *Strickland*, 466 U.S. at 686, 692; *United States* v. *Cronic*, 466 U.S. 648, 659 n.25 (1984). The Court also has applied a "limited" presumption of prejudice when counsel labored under a conflict of interest. *Strickland*, 466 U.S. at 692 (discussing *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)). Those contexts are fundamentally different from a claim that counsel rendered ineffective assistance by making specific errors during the presentation of the case. Such conduct is not directly attributable to government action. Nor is any deficiency in performance readily identifiable without contextual inquiry. And prejudice from attorney error is not so likely in every case that a fact-specific inquiry into prejudice is not worth the cost. *Strickland*, 466 U.S. at 692-693; *Smith* v. *Robbins*, 528 U.S. 259, 287 & n. 15 (2000).

B. Respondent's claim that his counsel was ineffective at his capital sentencing hearing by failing to present mitigating evidence and a closing statement is subject to the prejudice prong of *Strickland*. This Court already has held that *Strickland*'s two-part test applies to claims raising attorney error in failing to present mitigating evidence at a capital sentencing hearing. *Williams* v. *Taylor*, 529 U.S. 362, 395-399

(2000); *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987); *Darden* v. *Wainwright*, 477 U.S. 168, 184 (1986); *Strickland*, 466 U.S. at 698-699. There is no basis for a different treatment of claims of attorney error in failing to give a closing argument at sentencing. Like any trial decision, a waiver of closing argument may be both reasonable and non-prejudicial depending on the facts and circumstances of a particular case. The government has not prevented counsel from presenting closing argument, and it is not easy to identify such a decision as a denial of the right to counsel that is likely to be prejudicial in all cases.

C. The court of appeals erred in presuming prejudice based on this Court's statement in *Cronic*, 466 U.S. at 659, that prejudice may be presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." That statement is best understood as reserving the possibility that this Court would presume prejudice where counsel *totally* fails to participate in the defense. Extending the dicta in *Cronic* to claims that an attorney committed error by failing to present certain evidence or make certain arguments, however, would swallow the rule in *Strickland*. It would also undermine society's interest in the finality of convictions without serving any countervailing Sixth Amendment values. Properly understood, *Cronic*'s presumption of prejudice has no application to this case because counsel actively participated and assisted respondent at sentencing.

ARGUMENT

COUNSEL'S PERFORMANCE DOES NOT VIOLATE THE SIXTH AMENDMENT ABSENT A SHOWING OF PREJUDICE UNDER *STRICKLAND* v. *WASHINGTON*

A. *Strickland* v. *Washington* Governs All Claims Of Ineffective Assistance Of Counsel Based On Attorney Error

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). As this Court has explained, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984) (footnote omitted). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

This Court's decision in *Strickland*, *supra*, announced a general test for reviewing claims of ineffective assistance of counsel. Under *Strickland*, a claim of ineffective assistance of counsel at trial or capital sentencing has two components. First, the defendant must show that counsel's performance was deficient, in that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, the defendant must show that "the deficient performance prejudiced the defense" (*id.* at 687) in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694).

The requirement that a defendant must show prejudice reflects the principle that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Ibid.*; see also *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 (1993); *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986); *Strickland*, 466 U.S. at 686; *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986); *United States* v. *Morrison*, 449 U.S. at 364-365. Accordingly, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

2. *Strickland* involved a capital sentencing proceeding, which the Court found enough like a trial to make the description of the duties of counsel in the two contexts essentially equivalent. 466 U.S. at 686-687. Since *Strickland*, the Court has applied its two-part test in a variety of contexts besides trial and capital sentencing. The Court has employed *Strickland* to evaluate ineffectiveness claims in the entry of a guilty plea (*Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)); in failing to file pre-trial motions to suppress evidence on Fourth Amendment grounds (*Kimmelman* v. *Morrison*, 477 U.S. 365, 390-391 (1986)); and in failing to pursue claims arising from sentencing determinations made under the United States Sentencing Guidelines (*Glover* v. *United*

States, 531 U.S. 198, 203-204 (2001)). The Court has also applied *Strickland* to several types of ineffectiveness claims connected with the appeals process. The Court has employed *Strickland* to evaluate counsel's failure to raise a capital sentencing claim on appeal (*Smith* v. *Murray*, 477 U.S. 527, 535-536 (1986)); counsel's failure to file a notice of appeal (*Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000)); and counsel's decision to file an *Anders* (or equivalent) brief rather than a full merits brief on appeal (*Smith* v. *Robbins*, 528 U.S. 259, 285 (2000)). Considering the wide range of claims to which the Court has applied *Strickland*, it is not surprising that the Court recently noted that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000).

3. This Court has presumed prejudice only in narrowly defined Sixth Amendment contexts. *Strickland*, 466 U.S. at 692; see also *Smith* v. *Robbins*, 528 U.S. at 287; *Kimmelman* v. *Morrison*, 477 U.S. at 381 n.6. This Court has not required any showing of prejudice when the government has totally denied a defendant the assistance of counsel, or when the government has interfered with counsel's ability to represent the defendant at a critical stage of the proceeding. See *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.") see also *Cronic*, 466 U.S. at 659 & n.25 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" or if counsel is "prevented from assisting the accused during a critical stage of the proceeding."). "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not

worth the cost." *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658. "Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, 466 U.S. at 692.[3]

The Court has also applied a "limited[] presumption of prejudice" when the claim is that counsel represented conflicting interests. *Strickland*, 466 U.S. at 692. When counsel is burdened by an actual conflict of interest, prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980)); see also *Smith* v. *Robbins*, 528 U.S. at 287. The Court in *Strickland* reasoned that when counsel is burdened by an actual conflict of interest, he breaches "the most basic of counsel's duties" and "it is difficult to

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[3] The Court has found constitutional error without any showing of prejudice where the defendant was denied counsel at trial (*Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938)); at arraignment (*Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961)); or at a preliminary hearing (*White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). The Court similarly has not required a showing of prejudice when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686 (citing *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)); see also *Cronic*, 466 U.S. at 660-661 (describing appointment of counsel on the day of capital trial in *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

measure the precise effect on the defense of representation corrupted by conflicting interests." 466 U.S. at 692. The Court also explained that "a fairly rigid rule" is justified "[g]iven the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Ibid.*

By contrast, a defendant claiming ineffective assistance of counsel from attorney errors must *always* show prejudice. "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. The Court in *Strickland* explained that a presumption of prejudice is fundamentally inconsistent with the fact-specific nature of a claim based on attorney error:

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

Ibid.; see also *id.* at 702 (Brennan, J., concurring in part and dissenting in part) ("[C]laims of ineffective assis-

tance based on allegations of specific errors by counsel * * * by their very nature[] require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding.").

This Court has applied those principles in the appellate context by "distinguish[ing] [between] denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of counsel on appeal, which does not." *Smith* v. *Robbins*, 528 U.S. at 286. The Court refused to presume prejudice in *Smith* v. *Robbins* when the defendant received appellate counsel who declined to file a full merits brief on appeal pursuant to a valid state procedure under *Anders* v. *California*, 386 U.S. 738 (1967). The Court explained that "it is not the case that, if an attorney unreasonably chooses to follow a procedure such as *Anders* * * * instead of filing a merits brief, prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost. * * * [A]n error by counsel is neither 'easy to identify' (since it is necessary to evaluate a defendant's case in order to find the error) nor attributable to the prosecution." *Id.* at 287 & n.15 (internal quotation marks omitted); see also *Roe* v. *Flores-Ortega*, 528 U.S. at 483-484 (2000) (declining to presume prejudice *per se* where counsel neglected to file notice of appeal and holding that under *Strickland* defendant must show reasonable probability that he would have timely appealed but for counsel's errors).

B. Respondent's Claim That His Counsel Was Ineffective At Sentencing In Failing To Present Mitigating Evidence and To Make A Closing Argument Is Subject To The Prejudice Prong Of *Strickland* v. *Washington*

1. This Court's decisions firmly establish that a claim that counsel was constitutionally deficient in failing to present mitigating evidence at a capital sentencing proceeding must be evaluated under both prongs of *Strickland*. *Strickland* itself involved allegations of attorney error in failing to investigate and present mitigating evidence during the sentencing phase in a capital murder case, 466 U.S. at 675, and the Court found that, "even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence," *id.* at 698-699.

Two years after *Strickland* was decided, the Court held in *Darden* v. *Wainwright*, 477 U.S. 168, 184 (1986), that a claim that trial counsel had rendered ineffective assistance by failing to present mitigating evidence at a capital sentencing hearing "must be evaluated against the two-part test announced in *Strickland* v. *Washington*, 466 U.S. 668 (1984)." The Court followed the same approach the following year in *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987), which rejected under the performance prong of *Strickland* a prisoner's claim that his trial attorney rendered ineffective assistance by "offer[ing] no mitigating evidence at all" at two capital sentencing hearings.

Most recently, in *Williams* v. *Taylor*, 529 U.S. at 395-399, the Court found both prongs of *Strickland* satisfied in evaluating claims that counsel rendered ineffective assistance in failing to investigate and present mitigating evidence in the sentencing phase of a capital case. Despite the seriousness of the errors claimed in

that case, the Court did not bypass the prejudice prong of *Strickland*, but concluded that the errors were prejudicial only after carefully assessing whether there was a reasonable probability that the errors affected the outcome of the proceeding. *Id.* at 396-399.

2. There is no basis for a bypassing a prejudice inquiry when the ineffective assistance claim is that counsel failed to give a closing argument at a capital sentencing hearing. That claim is indistinguishable from any number of challenged attorney actions or omissions that may or may not be deficient or prejudicial depending on the facts of a particular case. "[I]t is well-settled that the decision to waive an opening or closing statement is a commonly adopted strategy" in order to prevent a damaging rebuttal from the prosecution. *Fox* v. *Ward*, 200 F.3d 1286, 1296 (10th Cir.), cert. denied, 531 U.S. 938 (2000). Both state and federal decisions have recognized that counsel may in a particular case forego a closing statement both in capital[4] and non-capital[5] proceedings without engaging in constitution-

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[4] See, *e.g.*, *Pickens* v. *Gibson*, 206 F.3d 988, 1001 (10th Cir. 2000) (guilt phase); *Fox* v. *Ward*, 200 F.3d at 1296 (guilt phase); *Moore* v. *Reynolds*, 153 F.3d 1086, 1104 (10th Cir. 1998) (penalty phase), cert. denied, 526 U.S. 1025 (1999); *Flamer* v. *Delaware*, 68 F.3d 710, 732 (3d Cir. 1995) (guilt phase), cert. denied, 516 U.S. 1088 (1996); *Lawhorn* v. *State*, 756 So. 2d 971, 986-988 (Ala. Crim. App. 1999) (penalty phase), cert. denied, 531 U.S. 835 (2000); *People* v. *Gaines*, 375 P.2d 296, 298 (Cal. 1962) (in bank) (guilt phase), cert. denied, 373 U.S. 928 (1963); *Dawson* v. *State*, 10 P.3d 49, 71 (Mont. 2000) (guilt phase), cert. denied, 121 S. Ct. 1372 (2001); *State* v. *Keith*, 684 N.E.2d 47, 67 (Ohio 1997) (penalty phase), cert. denied, 523 U.S. 1063 (1998); *State* v. *Burke*, 653 N.E.2d 242, 248 (Ohio 1995) (penalty phase), cert. denied, 517 U.S. 1112 (1996).

[5] See, *e.g.*, *United States* v. *Natanel*, 938 F.2d 302, 310 (1st Cir. 1991), cert. denied, 502 U.S. 1079 (1992); *United States ex rel.*

ally deficient performance. The fact that counsel in a particular case *reasonably* may waive a closing argument in furtherance of the defense is logically inconsistent with the conclusion that such conduct is invariably prejudicial in all cases. Indeed, courts in many cases have concluded that the absence of a closing argument was *not* prejudicial.[6]

For those reasons, a trial court cannot easily identify counsel's decision to waive a final argument as con-

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Spears v. *Johnson*, 463 F.2d 1024, 1026 (3d Cir. 1972); *United States ex rel. Taylor* v. *Barnett*, 109 F. Supp. 2d 911, 923-924 (N.D. Ill. 2000); *United States ex rel. Turner* v. *Cuyler*, 443 F. Supp. 263, 268 (E.D. Pa. 1977), aff'd, 595 F.2d 1215 (3d Cir. 1979); *Melvin* v. *Laird*, 365 F. Supp. 511, 521-522 (E.D.N.Y. 1973); *State* v. *Chee*, 680 P.2d 1232, 1234 (Ariz. Ct. App. 1984); *State* v. *Bojorquez*, 675 P.2d 1314, 1319 (Ariz. 1984) (in banc); *People* v. *Espinoza*, 99 Cal. App. 3d 44, 48 (Cal. Ct. App. 1979); *Shockley* v. *State*, 565 A.2d 1373, 1382 (Del. 1989); *People* v. *Conley*, 454 N.E.2d 1107, 1113 (Ill. App. Ct. 1983); *People* v. *Goodwin*, 322 N.E.2d 569, 573 (Ill. App. Ct. 1975); *Sparks* v. *State*, 499 N.E.2d 738, 743 (Ind. 1986); *State* v. *Johnson*, 551 So. 2d 14, 16 (La. Ct. App. 1989), writ denied, 556 So. 2d 56 (La. 1990); *Lowe* v. *State*, 779 S.W.2d 334, 335, 337-338 (Mo. Ct. App. 1989); *State* v. *Menn*, 668 S.W.2d 671, 673 (Tenn. Crim. App. 1984); *Salinas* v. *State*, 773 S.W.2d 779, 783 (Tex. Ct. App. 1989); *Medina* v. *State*, 626 S.W.2d 83, 86 (Tex. Ct. App. 1981); *Ransonette* v. *State*, 550 S.W.2d 36, 41 (Tex. Crim. App. 1976).

[6] See, e.g., *Pickens* v. *Gibson*, 206 F.3d at 1001 (capital case); *Moore* v. *Reynolds*, 153 F.3d at 1105 (capital case); *Flamer* v. *Delaware*, 68 F.3d at 732 (capital case); *Nutall* v. *Greer*, 764 F.2d 462, 466-468 (7th Cir. 1985); *United States ex rel. Taylor* v. *Barnett*, 109 F. Supp. 2d at 924; *Lawhorn* v. *State*, 756 So. 2d at 987-988 (capital case); *State* v. *Chee*, 680 P.2d at 1234; *People* v. *Gaines*, 375 P.2d at 298 (capital case); *Shockley* v. *State*, 565 A.2d at 1382; *People* v. *Miller*, 413 N.E.2d 143, 147 (Ill. App. Ct. 1980); *People* v. *Goodwin*, 322 N.E.2d at 574; *Sparks* v. *State*, 499 N.E.2d at 743; *State* v. *Johnson*, 551 So. 2d at 16; *State* v. *Robb*, 723 N.E.2d 1019, 1039 (Ohio 2000); *State* v. *Keith*, 684 N.E.2d at 68 (capital case); *Salinas* v. *State*, 773 S.W.2d at 783.

stitutionally deficient, or conclude that in all cases counsel would err in making the strategic judgment that closing argument would damage, rather than aid, the defense. Furthermore, because determining whether counsel's decision is objectively unreasonable under the first prong of *Strickland* requires a review of counsel's action in light of the entire record at trial (see, *e.g.*, Pet. App. 33-36), skipping the prejudice prong of *Strickland* would result in little (if any) added efficiency. See *Scarpa* v. *DuBois*, 38 F.3d 1, 14 (1st Cir. 1994) ("[O]nce it is necessary to examine the trial record in order to evaluate counsel's particular errors, resort to a *per se* presumption is no longer justified by the wish to avoid the cost of case-by-case litigation."), cert. denied, 513 U.S. 1129 (1995). Indeed, because it will "often" be "easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice," *Strickland*, 446 U.S. at 697, an irrebuttable presumption of prejudice could frustrate the efficient adjudication of claims of ineffective assistance.[7]

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[7] The court of appeals opined that the jurors "must have" inferred that counsel's waiver of closing argument "was an implicit agreement [by counsel] that justice required that [respondent] be put to death." Pet. App. 36. Whether a jury is reasonably likely to draw that inference, however, necessarily depends on the facts and circumstances of a particular case, which is exactly the inquiry that *Strickland* compels. There is no basis for the court of appeals' apparent assumption that a jury will invariably draw that inference regardless of the underlying facts. For example, if counsel were to close merely "to ask the jurors to spare [the defendant's] life in the name of simple mercy," as suggested by the court of appeals (*ibid.*), a closing could well damage the defense by giving the prosecution the opportunity to give a fiery rebuttal that emphasizes to the jurors the heinousness of the crime or the *defendant's* lack of "simple mercy" as he killed his victims. Waiving a closing that invites such a response may be all the more warranted

C. The Court of Appeals Erred In Presuming Prejudice Under *United States* v. *Cronic* Because Counsel Did Not Entirely Fail To Present A Defense

1. In holding that "[respondent] need not show actual prejudice" from counsel's performance, the court of appeals reasoned that, "[e]ssentially, [respondent] did not have counsel during the sentencing phase of his trial," and thus the prosecution's request for the death penalty "was not subjected to 'meaningful adversarial testing.'" Pet. App. 37 (quoting *Cronic*, 466 U.S. at 656)). The Court in *Cronic*, *supra*, which was decided the same day as *Strickland*, observed that an accused has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing" and that, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." 466 U.S. at 656, 659.[8]

Cronic, however, did not purport to detract from *Strickland*'s insistence that a defendant claiming ineffective assistance from *attorney error* must show prejudice. Indeed, *Cronic* held that the court of appeals erred in presuming prejudice from the appointment of a

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if, as in this case (see pp. 24-25, *supra*), a closing statement would only repeat defense counsel's plea in his opening remarks.

[8] *Cronic*, 466 U.S. at 659, explained that prejudice was presumed in *Davis* v. *Alaska*, 415 U.S. 308 (1974), which reversed a conviction when the defense was prevented from cross-examining a government witness. In *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683-684 (1986), however, this Court held that *Davis* did not establish a *per se* reversal rule and that the constitutionally improper denial of a defendant's opportunity to impeach a witness is subject to a harmless-error analysis under *Chapman* v. *California*, 386 U.S. 18 (1967).

young, inexperienced real-estate attorney 25 days before trial to represent a defendant charged with engaging in a complex check-kiting scheme. 466 U.S. at 663-666. The Court concluded that "[the defendant] can * * * make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel" which must "be evaluated under the standards enunciated in *Strickland* v. *Washington*." *Id.* at 666 & n.41. Thus, the Court concluded that "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26.

The Court's observation in *Cronic* that prejudice may be presumed "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing," 466 U.S. at 659 (emphasis added), is best understood as referring to the possibility of a *total* failure by counsel to participate in the defense at trial or at sentencing. See, *e.g.*, *Tucker* v. *Day*, 969 F.2d 155, 159 (5th Cir. 1992) (counsel silent through entire sentencing hearing); *Harding* v. *Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989) (counsel silent through entire trial, including when judge directed verdict against his client); *Martin* v. *Rose*, 744 F.2d 1245, 1247 (6th Cir. 1984) (counsel refused to participate in trial). In that instance, it may be readily apparent without a contextual analysis that the defendant has faced the prosecution as his adversary without the assistance of counsel. See *Nutall* v. *Greer*, 764 F.2d 462, 467 (7th Cir. 1985) ("If counsel had been totally passive, doing literally nothing in aid of his client's cause, we might infer prejudice without a particularized showing; no assistance at all could hardly be effective assistance.").

The courts of appeals have also extended *Cronic*'s presumption of prejudice when, during the trial or a critical stage of it, counsel is either physically absent or sleeping (and therefore unconscious). See *Burdine* v. *Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc) ("the buried assumption [of *Strickland*] is that counsel is present and conscious to exercise judgment, calculation and instinct") (quoting *Tippins* v. *Walker*, 77 F.3d 682, 687 (2d Cir. 1996)), petition for cert. pending, No. 01-495.[9] Even assuming the validity of those decisions, there is no basis for further extending *Cronic*'s presumption of prejudice to claims of attorney error where counsel is present, conscious, and representing the defense. Such an expansion would divorce the presumptions noted in *Strickland* and *Cronic* from their policy justification, *i.e.*, that the denial of the right to counsel is traceable to the government, or that the court can easily identify the denial of the right to counsel and prejudice is so likely that a case-by-case examination of prejudice is not worth the effort. *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658.

[9] See, *e.g.*, *Burdine* v. *Johnson*, 262 F.3d at 348 ("counsel was unconscious, and hence absent, repeatedly throughout the guilt-innocence phase of [the defendant's] trial."); *Tippins* v. *Walker*, 77 F.3d at 687 (defendant "suffered prejudice, by presumption or otherwise," where counsel's sleeping rendered him "repeatedly unconscious at trial for periods of time in which defendant's interests were at stake"); *Green* v. *Arn*, 809 F.2d 1257, 1263 (6th Cir.) (counsel was absent from trial during the taking of evidence on the defendant's guilt), vacated on other grounds, 484 U.S. 806 (1987); *Siverson* v. *O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985) (counsel was absent from courtroom during jury deliberations and return of verdict); *Javor* v. *United States*, 724 F.2d 831, 833 (9th Cir. 1984) (presuming prejudice pre-*Cronic* where counsel slept through substantial portions of trial).

Such an expansion also would lack a limiting principle. Virtually any claimed attorney error of omission or silence—*e.g.*, failure to conduct pretrial investigation, to file pre-trial motions, to make an opening or closing statement, to present evidence, or to cross-examine a key witness—could be characterized as a failure to subject the prosecution's case to a "meaningful adversarial testing" with respect to the matter at issue. *Cronic*, 466 U.S. at 659. And serious attorney missteps could be similarly characterized as a "constructive" denial of counsel at an important phase of the proceeding. See Pet. App. 32 and 36 ("[Respondent] may well have fared better if his counsel had left the courtroom entirely."). Such characterizations would swallow the rule of *Strickland* and later decisions applying that rule. See also *Scarpa* v. *DuBois*, 38 F.3d at 14 ("An overly generous reading of *Cronic* would do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*.").

2. A broad application of *Cronic*'s presumption of prejudice also would undermine society's strong interest in the finality of judgments. A retrial "imposes social costs, including the expenditure of time and resources for all concerned; the dispersal of witnesses and the erosion of witnesses' memories; and the occurrence of sundry other events that make obtaining a conviction more difficult on retrial." *Scarpa*, 38 F.3d at 15 (citing *Brecht* v. *Abrahamson*, 507 U.S. 619, 635-638 (1993)); see also *United States* v. *Mechanik*, 475 U.S. 66, 73 (1986); *Engle* v. *Isaac*, 456 U.S. 107, 126-128 (1982).

Those factors strongly cut against upsetting the outcome of a proceeding without a case-specific showing of prejudice except in those rare cases in which the defendant was denied the "'basic protections' without

which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rogers* v. *Clark*, 478 U.S. 570, 577-578 (1986)); *id.* at 8 (noting the "very limited class of cases" in which reversal is warranted without a showing of prejudice) (internal quotations marks omitted). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691; see *Hill* v. *Lockhart*, 474 U.S. at 58 ("requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas").

3. Under a proper understanding of *Cronic*'s description of when prejudice can be presumed, the court of appeals misapplied *Cronic* because there was not a *total* denial of counsel at respondent's capital sentencing.[10]

Counsel had already presented mitigating evidence in the guilt phase about respondent's mental condition, and counsel relied on that evidence at sentencing pursuant to Tennessee's capital sentencing statute. See p. 3 & n.1, *supra*. Counsel's opening statement at sentencing advised the jury that it could consider the

[10] The court of appeals did not consider whether its application of the language in *Cronic* created a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989). Because petitioner did not argue in the petition that presuming prejudice under *Cronic* in this case would create a "new rule" under *Teague*, this Court need not consider the issue. See *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994); *Godinez* v. *Moran*, 509 U.S. 389, 397 n.8 (1993).

mitigating evidence that was presented during the guilt phase. Pet. App. 114. That opening statement reminded the jurors of the defense theory during the guilt phase that respondent committed the murders "while [he] was under the influence of extreme mental or emotional disturbance," and that the judge would instruct them that they could consider respondent's mental capacity when determining whether to return a verdict sentencing respondent to death. *Id.* at 115. The statement also summarized for the jury the testimony of two defense experts, Dr. Matthew Jaremko and Dr. Lipman, who opined that respondent was suffering from "Vietnam Veteran's Stress Syndrome" and "Amphetamine Psychosis" as a result of drug abuse. *Ibid.* Counsel concluded his remarks by pleading for mercy and asking the jury to spare his client's life. *Id.* at 116-117.

Counsel at sentencing also elicited testimony on cross-examination of a prosecution witness that respondent had a record of distinguished military service. Trial Tr. 2123-2124. Counsel made several objections during the prosecution's presentation of aggravating factors, *id.* at 2129, 2130, and counsel obtained a court ruling excluding from the jury a series of gruesome photographs of the murder victims' dead bodies, *id.* at 2134-2143. In those circumstances, it can hardly be said that respondent's "counsel *entirely* fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659 (emphasis added). Accordingly, there is no basis for departing from *Strickland*'s requirement that errors by counsel must be prejudicial to justify relief under the Sixth Amendment. Unless respondent can show both that counsel's performance was deficient, *and* that there is a reason-

able probability that but for the lapse, the outcome would have been different, he is not entitled to relief.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11] Because this case arises on federal habeas corpus, the district court and court of appeals are also bound by 28 U.S.C. 2254(d)(1), which bars relief unless the state courts' adjudication of the claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See *Williams* v. *Taylor*, 529 U.S. at 407.